United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/affidavit

75-4093

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4093

FLORENTINO ALONZO ZAMORA, MARIA LUISA ZAMORA, and ROBERTO ZAMORA,
Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys, Of Counsel.

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CASES CITED

ISSUE PRESENTED

WHETHER THE DECISION OF THE BOARD OF IMMIGRATION APPEALS AFFIRMING THE IMMIGRATION JUDGE'S DENIAL OF PETITIONER'S APPLICATION FOR WITHHOLDING OF DEPORTATION WAS ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION

STATEMENT OF THE CASE

Pursuant to Section 106 of the Immigration and Nationality Act, 8 U.S.C. §1105a Florentino Alonzo Zamora, Maria Luisa Zamora, and Roberto Zamora petition this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on April 17, 1975. That order dismissed an appeal from a decision of an Immigration Judge denying the petitioners' applications for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h). Petitioners contend that the Board's order should be reversed because the denial of their application for withholding of deportation violated their Fifth Amendment rights to due process of law.

STATEMENT OF FACTS

The petitioner, Florentino Alonzo Zamora, is a forty year old alien, a native and citizen of the Philippines, who was admitted to the United States on October 10, 1970 as a nonimmigrant visitor for business and was authorized to remain until December 30, 1970. Zamora is the spouse of petitioner, Maria Luisa Zamora, and father of petitioner, Roberto Zamora. He requested and received three extensions of his visitation, allowing him to remain in the United States until October 30, 1971. At the expiration of his authorized visitation on October 30, 1971 he neither requested nor received any additional extensions and has been residing and working in the United States since that date in violation of the law.

The petitioner, Maria Luisa Zamora, is a 39 year old alien, also a native and citizen of the Philippines who was admitted to the United States on January 16, 1971 as a nonimmigrant visitor for pleasure. She was accompanied by her son Roberto Zamora who is also a petitioner in this action. Maria Luisa Zamora and her son were authorized

to remain in the United States until April 15, 1971. They requested and received two additional extensions of their visitation. They failed to depart from the United States at the expiration of their authorized visitation on January 15, 1972 and have been residing in the United States in violation of the law.

On August 7, 1972 the Immigration and Naturalization Service (the "Service") commenced deportation proceedings against the petitioners with the issuance of orders to show cause and notices of a hearing charging that they were deportable from the United States under Section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2). On February 14, 1973 the petitioners made an administrative application for political asylum in the United States. On November 29, 1973 the Zamoras were interviewed at the Service's district office at New York with respect to these applications. In accordance with established procedures, 8 C.F.R. §108, the Service's District Director requested an advisory opinion from the Department of State, Office of Refugee and Migration Affairs. On March 6, 1974

the Department of State responded finding that there was no reason to believe that the petitioners should be exempt from regular immigration procedures on the grounds that they would suffer persecution on account of race, religion, nationality, political opinion or membership in a particular social group. The Service did not grant the petitioners' request for asylum, and proceeded forward with deportation proceedings.

At their deportation hearing on May 21, 1974 the petitioners, by their counsel, conceded their deportability as charged in the orders to show cause. During the deportation hearing the Zamoras again applied with withholding of deportation pursuant to Section 243(h) of the Act on the ground that they would suffer persecution upon their return to the Philippines. In response to this application the Service trial attorney introduced into evidence the Department of State's advisory opinion which had previously been obtained by the Service, as well as, the District Director's request for that recommendation. During the hearing the adult petitioners were also questioned by their attorney in an attempt to elicit

testimony which might support their claim of anticipated persecution. The aliens also submitted various newspaper clippings, as well as, one paid political advertisement to support their claim. None of the documentary evidence submitted by the petitioners referred to them. On May 24, 1974 the Immigration Judge rendered a decision denying the aliens' application for withholding of deportation pursuant to Section 243(h) of the Act, finding that they had failed to demonstrate that there was a clear probability of persecution in their respective cases. The Immigration Judge granted the Zamoras the privilege of voluntary departure, in lieu of enforced deportation, pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e). On June 4, 1974 the petitioners appealed the decision of the Immigration Judge to the Board of Immigration Appeals. On April 17, 1975 the Board dismissed the appeal. Since the filing of this action on May 22, 1975 the aliens have enjoyed the automatic statutory stay of deportation which accompanies the filing of a petition pursuant to Section 106 of the Act, 8 U.S.C. §1105a.

RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. §1253 -

* * * * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

RELEVANT REGULATION

Title 8, Code of Federal Regulations (C.F.R. §242.17
242.17 Ancillary matters, applications

* * * * *

(c) Temporary withholding of deportation.* * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of

> respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

ARGUMENT

THE ATTORNEY GENERAL DID NOT ABUSE HIS DISCRETIONARY AUTHORITY IN DENYING PETITIONERS' APPLICATION FOR TEMPORARY WITHHOLDING OF DEPORTATION

A. General background

Section 243(h) of the Act, 8 U.S.C. §1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized delegate.* Muscardin v. Immigration and Naturalization

*The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

Service, 415 F.2d 865 (2d Cir. 1969); United States ex rel. Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. §242.17(c); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968). See also Hyppolite v. Immigration and Naturalization Service, 382 F.2d 98 (7th Cir. 1967); Lena v. Immigration and Naturalization Service, 379 F.2d 536 (7th Cir. 1967).

In examining the broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. Muscardin v. Immigration and Naturalization Service, supra; Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963). Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966); Vardjan v. Esperdy, 197 F. Supp. 931 (S.D.N.Y. 1961), aff'd, 303 F.2d 279 (2d Cir. 1962).

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary authority by denying the aliens' application for withholding of deportation. Li Cheung v. Esperdy, 377 F.2d 819 (2d Cir. 1967); Kladis v. Immigration and Naturalization Service, 343 F.2d 515 (7th Cir. 1965).

B. The Immigration Judge did not err in admitting into evidence the advisory opinion obtained from the Department of State.

The petitioners contend that the Department of State's "denial" of their request for political asylum violates their Fifth Amendment right to due process of law in deportation proceedings.* It is submitted that such a contention erroneously describes the procedures involved in deportation hearings relating to an application under Section 243(h) of the Act, and is totally extraneous to the issue in this case. The petitioners first made an application for political asylum with the District Director for the Service (T. 13). Under established procedures, if the District Director does not approve the

*It is noted that this is the first time the petitioners raise this objection. During the deportation proceeding below counsel for the petitioners expressly agreed that the Department of State's advisory opinion be admitted into evidence. Nor was this claim raised before the Board of Immigration Appeals. Furthermore, the Immigration Judge's decision specifically notes that his determination was made without consideration of the views of the Department of State. While the respondent contends that the petitioners waived this argument below, nonetheless, the following discussion will indicate that the advisory opinion was properly admitted into evidence.

claim, he forwards it to the Office of Refugee and Migration Affairs, Department of State, for an expression of its views. Rather than being an administrative "denial" of their application for political asylum the letter from the Department of State is merely advisory in nature and is not binding upon the Service. After studying the case, the Director of the Office of Refugee and Migration Affairs was of the opinion that the petitioners did not have a valid persecution claim and the District Director, concurring, denied the application. The refusal of the District Director to grant an application for asylum does not deprive the aliens of again applying for withholding of deportation pursuant to Section 243(h) of the Act at a deportation hearing.

Subsequently, petitioners applied for withholding of deportation and their persecution claim was considered de novo by the Immigration Judge. The Immigration Judge did not request an expression from the Department of State concerning the likelihood of persecution. Rather, the Service's trial attorney offered into

evidence the letter from the Office of Refugee and Migration Affairs obtained earlier by the District Director. The letter is merely one piece of evidence. It is not binding upon the Immigration Judge and in this case was not even a basis for his decision* Petitioners complain that the process by which the Department of State makes its recommendation to the District Director denies them the opportunity to inquiry into relevant facts considered by that department in formulating its opinion; to examine witnesses and information from that department; and to challenge its

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*The petitioners' assertion that the letter from the Office of Refugee and Migration Affairs creates a double presumption against the aliens, is ill founded and analogous to charges in the past where aliens have attacked decisions of the Immigration Judge and the Board of Immigration Appeals on the grounds that they were subject to the control of the Department of Justice and were therefore incapable of rendering impartial decisions. These contentions have been rejected by the Courts. Marcello v. Bonds, 349 U.S. 302 (1955); Shaughnessy v. Accardi, 349 U.S. 280 (1955); Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25 (9th Cir. 1968). The Immigration Judge, although employed by the Department of Justice, is an independent hearing officer and his actions can be dictated to by no one. If he is not even subject to the control of the department by which he is employed, it is difficult to see how he can be controlled by the Department of State, with which he has no relationship at all.

procedure. In this respect it is submitted that the petitioners are clearly in the wrong forum. Furthermore, the information contained in the District Director's request to the Department of State (T. 12) was received from the petitioners as a result of an interview on their application wherein they could have submitted any and all information which might have been favorable to their application.

With respect to the introduction of that advisory opinion at the deportation hearing wherein their claim was considered de novo, it is submitted that the letter "came from a knowledgeable and competent source and was admissible at the hearing". Asghari v. Immigration and Naturalization Service, 396 F.2d 391 (9th Cir. 1969). See also 8 C.F.R. §242.14(c). Such letters have been held admissible. Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25 (9th Cir. 1969); Sheng v. Immigration and Naturalization Service, 400 F.2d 678 (9th Cir. 1968), cert. denied, 393 U.S. 1054 (1969); c.f. Namking v. Boyd, 226 F.2d 385 (9th Cir. 1955), even though

their quality may have been questioned.* Hosseinmardi, supra. The letter was certainly of probative value.

The Immigration Judge made his decision based on the totality of the evidence, including both the petitioners' testimony and documentary evidence submitted by the aliens. He enjoyed the advantage of seeing and hearing the petitioners, and was in the best position to determine the accurace, reliability and truthfulness of the petitioners' testimony; and his evaluation thereof is entitled to great weight. Kokkinis v. District Director, 429 F.2d 938 (2d Cir. 1970); Sigurdson v. Landon, 215 F.2d 791, 796 (9th Cir. 1954).

The deportation hearing complied with all the requirements of a fair hearing. Sung v. McGrath, 339 U.S. 33 (1950). The petitioners were represented by counsel. They were given the opportunity to be heard and to introduce evidence and witnesses on their behalf.

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*It is also noted that the aliens were given an opportunity to inspect that recommendation and present evidence contradicting it. Compare Radic v. Fullilove, 198 F. Supp. 162 (N.D. Calif. 1961).

8 C.F.R. §242.16. Absent any arbitrariness or abuse of discretion the decision of the Immigration Judge should be allowed to stand.

C. The evidence before the Attorney General failed to establish a clear probability of political persecution

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies; nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule; that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

Under 8 C.F.R. 242.17(c) the petitioners have the burden of establishing that they would be subject to

persecution. MacCaud v. Immigration and Naturalization Service, 500 F.2d 355 (2d Cir. 1974); They must set forth the condition relating to them personally which support their anticipation of persecution. Fu v. Immigration and Naturalization Service, supra. This the petitioners were unable to do.

The basis of the aliens' claim is that martial law had been instituted by the Government of the Philippines after they were admitted to the United States and during their prolonged and illegal stay in this country. As pointed out in the decision of the Immigration Judge their fear of returning to the Philippines is one which is of general applicability to all citizens of that country and not a fear of persecution which occurs by reason of their race, religion, nationality, political opinion or membership in a particular social group. Their evidence, consisting solely of bare conclusory statements relating to the then existing political situation in their homeland, was without first-hand knowledge or factual support which might demonstrate the reasonableness of their fear that they would be

persecuted. It is respectfully submitted that this is insufficient to sustain their burden. See Khalil v. District Director, 457 F.2d 1276 (9th Cir. 1972); Gena v. Immigration and Naturalization Service, 424 F.2d 227 (5th Cir. 1970).

The Zamoras claim that they will be subject to political persecution because of a political climate applicable to all citizens of the Philippines. This allegation is insufficient to satisfy the requirement of personal and particularized persecution under Section 243(h) of the Act. Questioning by their attorney and the Immigration Judge failed to elicit any response as to how they themselves would suffer harm from their political opinions. Mr. Zamora made the unsubstantiated claim that at some unspecified time he participated in a political demonstration, but neither he nor his family were arrested at that time or thereafter. The petitioners further allege that a cousin is married to the son of a sister of a Philippine Senator. Nonetheless they fail to establish how this relationship, if it exists, establishes that they

will suffer persecution. Even in their memorandum to the Board of Immigration Appeals the petitioners acknowledge that their claim is based on the supposition that there exists in the Philippines a situation of general political unrest which leads them to believe they "might" be persecuted upon their return home.

Although the petitioners may be opposed to the present government in the Philippines (but even this has not been established in the record of proceedings), and may quite understandably prefer life in the United States, the statute demands a determination based upon the clear probability of persecution of the petitioners themselves not of others or the general public. Kovac v. Immigration and Naturalization Service, 407 F.2d 102 (9th Cir. 1969).

It is submitted that the petitioners have not met the burden of proving that they would be singled out as individuals and persecuted upon their return to the Philippines and accordingly there was no abuse of discretion in denying them withholding of deportation on these grounds.

If the petitioners' persecution claim was rejected twice, once by the District Director and once by the Immigration Judge, it was not because of Government prejudice but rather because the claim is frivolous.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 75-4093

State of New York)
County of New York) ss

Pauline P. Troia being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2

1st day of March, 19 76 she served ~~a~~ copys of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Barst & Mukamal, Esqs.,
127 John St.
NY NY 10038

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

1st day of March, 19 76

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977